Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Level 3 Communications LLC	)	
Petition for Forbearance Under	)	WC Docket No. 03-266
47 U.S.C. § 160(c) from Enforcement	)	
of 47 U.S.C. § 251(g), Rule 51.701(b)(1),	)	
and Rule 69.5(b)	)	

Comments of The Progress & Freedom Foundation

The Progress & Freedom Foundation (PFF), a private, non-profit, non-partisan research institution, submits these comments in support of Level 3's Petition for Forbearance[1] in this proceeding. The views expressed in these comments are those of the author and do not necessarily reflect the views of the directors, officers or staff of the Foundation.

I. Background

The Commission's recent decision that the Pulver.com Free World Dialup service is an unregulated information service was the first step in the right direction for the non-regulation of Voice over Internet Protocol (IP or VoIP) technology. It also was the easiest step to take. This proceeding asks the Commission to resolve a more difficult question – what to do with VoIP when it touches the public switched telephone network (PSTN).

The Level 3 petition requests that the Commission forbear from imposing inter- or intrastate access charges on IP traffic that originates or terminates on the PSTN, or likewise on "incidental" PSTN-PSTN traffic. As VoIP is inherently interstate in nature, it is within the

[1] *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (Filed Dec. 23, 2003) (hereinafter "Level 3 petition").

Commission's sole discretion to determine whether, and to what extent, these charges should apply.

The Commission has permitted VoIP to flourish through regulatory forbearance. This course should continue. Keeping VoIP technology from getting dragged back into a decrepit world of legacy regulation should be the Commission's top priority.

For the past eight years, federal and state regulators have resisted making politically inexpedient decisions that could have, in a "but for" world, established the appropriate regulatory conditions for a new competitive marketplace. Access charges are part and parcel of this equation. Once a legitimate cost recovery and universal service mechanism, access charges increasingly represent an unsavory temptation to bootstrap needless economic regulation to a potentially revolutionary technology. Rural and smaller local exchange carriers, for instance, receive nearly seventy percent of their revenues from access charges.[2] These charges can make sense so long as a ubiquitous, circuit-switched, distance sensitive network predominates. They are undermined in an IP network "because it's impossible to tell where a VoIP call goes."[3]

Of course, the current access system cannot be blithely trashed. The move toward IP-based communications necessitates "weaning" local exchange companies off of this increasingly problematic payment system over time. The Level 3 petition should thus be viewed not only as requiring regulatory forbearance as a matter of law, but also as providing the Commission with an opportunity to complete intercarrier compensation reform on an accelerated timetable.

[2] Comm. Daily, Wireline Section (Feb. 11, 2004).
[3] Comm. Daily, *Abernathy: Some VoIP Regulation Will be Needed* (Feb. 20, 2004).

II. Moving Toward a Unified Intercarrier Compensation Regime

Nearly two years ago, the Commission opened a rulemaking to develop a unified intercarrier compensation regime.[4] Recent news reports indicate that industry representatives are negotiating a proposed intercarrier compensation plan, and Commissioner Copps has urged industry to present this to the Commission by the end of the year.[5]

One premise of the Level 3 petition is that the adoption of a unified regime will serve as the overarching resolution to the current access charge dilemma.[6] According to the petition, it is senseless to "take IP-PSTN traffic, which today is generally not subject to access charges, shift that traffic into the access charge regimes, and then reconvert all access traffic to a unified regime that more closely resembles Section 251(b)(5)."[7]

While this argument is sound as a practical matter, the granting of "permanent" forbearance may serve as a disincentive to achieving further progress towards adoption of a new intercarrier compensation regime. On the other hand, granting the petition on a temporary basis and tying it to the adoption of an intercarrier compensation regime, albeit even a transitional one, can provide equal incentives to bring all industry players to the table.

As such, in granting the Level 3 petition the Commission is also urged to set a hard deadline for industry to submit a plan for intercarrier compensation reform. If industry is unable to bring a mutually agreeable and satisfactory solution to the Commission by that deadline, or if the Commission otherwise does not believe that adoption of a new intercarrier compensation regime appears likely within a reasonable time period, the Commission can then decide whether

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[4] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking (Rel. Apr. 27, 2001).
[5] Comm. Daily, *Copps Urges FCC to Focus First on Broadband Buildout* (Feb. 26, 2004).
[6] *See* Level 3 Petition at pp. v, vi, 4, 30-31, 40-41 & 47.
[7] *Id.* at v.

or not to impose access charges on VoIP based upon the record before it, including any petitions seeking a further extension of the forbearance period.

III. A Caution Against Regulatory Arbitrage

Without a doubt, one reason why many companies are drawn to VoIP is because it is perceived as a path to escaping an economically irrational legacy regulatory system. However, it also appears that some service providers are framing predominantly circuit-switched calls as VoIP to exploit the deregulatory void.

In a footnote, the Level 3 petition supports extending forbearance beyond incidental PSTN-PSTN traffic to all PSTN-PSTN voice-embedded IP.[8] AT&T has filed a petition with the Commission for a declaratory ruling that these "phone-to-phone" VoIP calls are exempt from access charges.[9] To the extent that the issue is considered in this proceeding, it should be denied. Unlike PSTN-IP or IP-PSTN calls, which undergo net protocol conversion along a significant portion of the calling path, a PSTN-PSTN call that is routed over IP transport is a distinction without a difference.[10]

Like the access charge dilemma, the issues surrounding the "metaphysics"[11] of VoIP imply that intercarrier compensation reform should be the Commission's imperative, above all else. A unified model, properly conceived, will eliminate the incentives for parties to game the system.

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[8] Level 3 Petition at n. 20.

[9] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002).

[10] The Level 3 Petition concedes that, for purposes of this proceeding, "incidental" PSTN-PSTN traffic "does not include traffic that originates and terminates in circuit-switched format (*i.e.*, no net protocol conversion) . . ." *Id.* at 7.

[11] *See* Randolph J. May, *The Metaphysics of VoIP*, CNet News.com (Jan. 5, 2004).

IV. Conclusion

As a whole, the Level 3 petition allows the Commission to further plot an unregulatory path for a promising technology. Although there is still time before VoIP is widely deployed, the Commission should move quickly to resolve the emerging access charge dilemma. The Commission should therefore grant the Level 3 petition as soon as possible and expedite the adoption of a unified intercarrier compensation regime, at least on a transitional basis. This approach will meet not only the needs of Level 3 and similarly situated companies in providing regulatory certainty on a going-forward basis, but those of their competitors as well.

Respectfully submitted,

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